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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 39

PAUL WILLIAMS and LORENA WILLIAMS, husband and wife, *Petitioners,*

v.

HUGH LEE, doing business as GANADO TRADING POST.

On Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF FOR THE PETITIONERS

NORMAN M. LITTELL,
1824-26 Jefferson Place, N.W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.

CHARLES J. ALEXANDER,
1824-26 Jefferson Place, N.W.,
Washington 6, D. C.,
Of Counsel.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (R. 54-55) is reported at 83 Ariz. 241 and 319 P. 2d 998. The opinion of the Superior Court of Arizona for Apache County (R. 38-42) is not reported.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on January 7, 1958 (R. 62) and amended as to costs on February 11, 1958 (R. 63); it is final by its terms. The petition for writ of certiorari was

filed on February 26, 1958, and granted on April 14, 1958 (R. 63). The federal question was duly raised and passed upon throughout the course of the proceedings below (Pet. 5; Appendix C, Pet. A10-A16). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the courts of Arizona have jurisdiction of an action brought against members of the Navajo Indian Tribe by a non-Indian with respect to a transaction arising within the boundaries of the Navajo Indian Reservation in Arizona.[1]

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The federal and state constitutional provisions, statutes, and regulations that are involved in this case are set forth in Appendix A, *infra*, pp. 25-29.

STATEMENT

The facts out of which the present controversy arises are not in dispute, and were in large measure stipulated (R. 42-44).

Petitioners, husband and wife, are duly enrolled members of the Navajo Tribe and citizens of the United States, and at all times here material resided within the boundaries of that portion of the Navajo Indian

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[1] Under Point II, below, *infra*, pp. 19-23, petitioners argue that their immunity from State jurisdiction is as broad as it is stated in the question, and is not limited by the subject-matter of particular transactions so arising. For reasons set out below, pp. 20-21, petitioners no longer press the second question originally presented (Pet. 2).

Reservation lying in Arizona as defined by the Act of June 14, 1934, c. 521, 48 Stat. 960 (R. 43).

Respondent, a non-Indian, operated a general merchandise store known as the Ganado Trading Post, on land that is a part of the Navajo Reservation, pursuant to permission granted by the Secretary of the Interior and the Commissioner of Indian Affairs (R. 43) under the authority of what is now 25 U.S.C. § 262 (*infra*, p. 27). Among the regulations for trade with the Indians promulgated under the cited statute is 25 C.F.R. § 252.17 (*infra*, p. 29), entitled "Credit at trader's risk," which provides *inter alia* that "A trader may extend credit to Indians, but such credit will be at the trader's own risk."

At petitioners' request, respondent sold them merchandise of the value of $361.22, on credit (R. 42). Following demands for payment, the present action was brought in the Superior Court of Arizona for Apache County. Thereafter, petitioners paid $280 on account, leaving $81.22 still owing. All of the sales and deliveries of the merchandise, and all of the payments in respect thereof, were made within the boundaries of the Navajo Indian Reservation. (R. 42-43).

The summons in the present case was served on petitioners within the boundaries of the Navajo Indian Reservation, and within the exterior boundaries of Apache County as defined by Arizona (R. 43).

At the time of commencing the action, respondent procured a writ of attachment from the clerk of the Superior Court directing the sheriff of Apache County, Arizona, to attach a band of sheep belonging to petitioners (R. 3). The sheriff duly seized these sheep, along with others alleged to be owned by others than

petitioners, inside the Navajo Reservation, on reservation land (R. 43, 4, 8). After the sheep had been in custody for a number of months, some were sold by the sheriff at respondent's trading post on the Navajo Reservation, and the remainder were returned to petitioners (R. 31-32). The proceeds of the sale were $272, plus $2 advanced by petitioners (R. 32), but the costs of sale amounted to $246.72 (R. 32-33).

Petitioners moved to dismiss the action and to dissolve the attachment because of lack of jurisdiction, on the ground of their membership in the Navajo Tribe and residence on the Navajo Reservation (R. 4-5). This motion was denied (R. 38-42).

The parties thereafter stipulated the facts and waived further appearance in the Superior Court (R. 42-44). Thereupon the Superior Court entered judgment in favor of respondent in the sum of $82.22 (R. 45, 50),[2] and dismissed the counterclaim (R. 44-45, 49).

Petitioners appealed to the Supreme Court of Arizona (R. 45-46), which sustained the jurisdiction of the Superior Court, though holding the attachment and sale of the sheep illegal (R. 54-62). Dismissal of the counterclaim, although noted in the statement of points on appeal (R. 50), was not assigned as error in petitioners' brief in the Supreme Court of Arizona.

This Court granted certiorari (R. 63).

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[2] Why judgment was entered for $82.22 in the face of the stipulation (R. 42) that only $81.22 was owing is not explained by anything in the present record.

SUMMARY OF ARGUMENT

I. Ever since *Worcester* v. *Georgia*, 6 Pet. 515, decided in 1832, it has been settled that state law is ineffective to reach Indians except insofar as Congress has specifically and expressly made them subject to such law. The fact that petitioners are citizens of the United States is quite immaterial. It is well settled that an Indian's citizenship is completely irrelevant when considering his amenability to state law. The test of state jurisdiction is not citizenship but Congressional action in the premises.

Whenever Congress has considered that particular Indians have so far advanced in adaptability so as to live among non-Indians on competitive terms, to the point where state law may appropriately be made applicable to them, it has expressed its consent to such a step in clear and unequivocal language. Several acts to that effect were passed in 1948, 1950, and 1953. But when Congress in 1949 passed a bill making the Navajos subject to state law, the President vetoed the bill, although apart from the jurisdictional features it benefited them; and in the following year Congress repassed the bill without the objectionable jurisdictional provisions. Moreover, Arizona has not sought to avail itself of a subsequent measure under the terms of which it might exercise jurisdiction over the Navajos.

Arizona has jurisdiction over the territory of the Navajo Reservation within its boundaries—except in matters concerning Indians. And the court below held, less than a month after the decision under review, that Arizona had no criminal jurisdiction over Navajo Indians on the Navajo reservation. *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697.

Since the action in the present case was brought against Navajo Indians, resident on the Navajo reservation, with respect to a transaction arising there, it was beyond the jurisdiction of the Arizona courts. That being so, the process of those courts was a nullity. It is accordingly unnecessary to determine whether the state sheriff had any physical right to serve such a scrap of paper within the reservation.

II. The Arizona courts also specifically lacked jurisdiction over the particular subject-matter of the present action, which arose out of a commercial transaction between Indians and a Federally licensed Indian trader. Here the source of Federal power is the Congressional power to regulate commerce with the Indians (which includes commerce with individual Indians), a power that is exclusive, absolute, and plenary.

Pursuant to that power, Congress has declared that trade with the Indians is subject to such regulations as the Commissioner may prescribe for their protection. Those regulations are elaborate and rigorous, and respondent subjected himself thereto when he traded with petitioners on the Navajo Reservation.

Petitioners do not now contend, in view of the textual history of those regulations, that the sale respondent made to them on credit was unenforceable.

But since the subject-matter of the transaction was trade between Indians and a Federally licensed Indian trader, a subject-matter within the exclusive competence of Congress, it cannot be made the subject of litigation in state courts. The court below held illegal the levy and sale of petitioners' sheep, relying on one of the Commissioners regulations that dealt with livestock. But this narrow view is insufficient to protect

petitioners, since the judgment now outstanding can be enforced against other property of theirs that is not within the regulation which protects livestock. Under the decision below, the property and way of life of all tribal Indians have thus been seriously jeopardized.

Consequently, reversal of the plainly erroneous judgment below should not be rested on the narrow ground of lack-of-jurisdiction-of-subject-matter, but rather on the broad and basic proposition that state courts have no jurisdiction over tribal Indians residing on Indian reservations in reference to any transactions arising there. That broader proposition has been recognized by Congress and by the President, and is solidly founded on an unbroken line of decisions of this Court over a period of more than a century and a quarter.

ARGUMENT

Petitioners' basic contention is that, since they are Indians and since the transaction out of which the present action arose took place on an Indian reservation, they cannot be sued in respect thereof in the courts of a State in the absence of Congressional consent to the exercise of such jurisdiction—and such consent has never been conferred.

Additionally, petitioners point out that, since the transaction out of which the present action arose was one between Indians and a Federally licensed Indian trader, the State courts had no jurisdiction of the subject-matter. But they go on to show that Indian immunity from State jurisdiction cannot properly be limited to subject-matter, and that the decisions of this Court and the uniform course of executive and

legislative action all combine in requiring that their exemption from State jurisdiction be placed on the broader ground of the basic contention stated in the preceding paragraph.

I. A State court has no jurisdiction of a suit by a non-Indian against an Indian arising out of a transaction taking place on an Indian reservation unless Congress has consented to the exercise of such jurisdiction; and no such consent has been given here.

From *Worcester* v. *Georgia*, 6 Pet. 515, decided in 1832, through *United States* v. *Kagama*, 118 U.S. 375, and a host of other cases, it has been settled that state law is ineffective to reach Indians except insofar as Congress has specifically and expressly made them subject to such law. The ruling below accordingly disregards and runs counter to more than a century of decisions here, nullifies the plain import of legislation enacted by Congress, and thus opens the door wide to systematic spoliation of the Indian wards of the United States. It is sufficient simply to examine some of the controlling precedents.

In *Worcester* v. *Georgia*, 6 Pet. 515, the State of Georgia, by Sec. 6 of its Act of December 19, 1829, purported to extend its civil and criminal laws over the Cherokees and the territory occupied by them. See 6 Pet. at 526. This Court, speaking through Chief Justice Marshall, held the extension void (6 Pet. at 561):

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the

assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States.

* * * * * * * * *

"* * * the acts of Georgia are repugnant to the Constitution, laws, and treaties of the United States.

"They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union."

After *Ex parte Crow Dog,* 109 U.S. 556, which held that there was no federal jurisdiction to punish a murder committed by one Indian on another Indian within an Indian reservation, Congress amended the law to make such offenses triable in federal courts; and in *United States* v. *Kagama,* 118 U.S. 375, that jurisdiction was upheld over such offenses within a reservation located in the State of California. The Court said (118 U.S. at 383-384):

"* * * The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress *has* done this, and *can* do it, with regard to all offenses relating to matters to which the federal authority extends. Does that authority extend to this case?

"It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offense under the statute is committed by an Indian, that it is committed on a Reservation set apart within the State for residence of the Tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other Tribe. It does not interfere with the process of the state courts within the Reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some Tribe, of a criminal character, committed within the limits of the Reservation.

"It seems to us that this is within the competency of Congress. These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen.

Application of the foregoing principles—which, but for the opinion below, have never been doubted—makes it plain that, unless Congress has specifically consented to the exercise of Arizona's jurisdiction over

the Navajo Indians, the Arizona courts have no jurisdiction of the present action.

We note in passing that there is no support whatever for the ground taken by the Superior Court of Apache County in this case, that petitioners are subject to the jurisdiction of Arizona because they are citizens of the United States and of Arizona (R. 38-42). The rule is unquestioned that the grant of citizenship to an Indian does not without more render him subject to state law, and that an Indian's citizenship has no relevance whatever when considering his amenability to state law. E.g., *United States* v. *Rickert*, 188 U.S. 432, 445; *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310-316; *United States* v. *Nice*, 241 U.S. 591, 598; *United States* v. *Waller*, 243 U.S. 452, 459-460; *Brader* v. *James*, 246 U.S. 88, 96; *Winton* v. *Amos*, 255 U.S. 373, 391-392; *Creek County* v. *Seber*, 318 U.S. 705, 718. It is true that the court below did not rest its decision on petitioners' citizenship, but since the point is in the record it seems appropriate to scotch it at the outset.

The test of state jurisdiction here is not citizenship but Congressional action in the premises.

When Congress considers that a particular tribe of Indians have so far advanced in adaptability as to be able to assume all of the duties of citizenship, and to be able to live among and mingle with non-Indians on competitive terms, to the point where the laws of the several states may appropriately be made applicable to them, it has expressed its consent to such a step in clear and unequivocal language.

Thus, in 1948, Congress declared that—with an exception as to hunting and fishing rights—"The State

of New York shall have jurisdiction over offenses committed by or against Indians or Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the state: * * *" Act of July 2, 1948, c. 809, 62 Stat. 1224, 25 U.S.C. § 232.

Two years later, in 1950, Congress consented to the exercise of New York jurisdiction in civil cases, effective in 1952. It said: "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State." Act of September 13, 1950, c. 947, 64 Stat. 845, 25 U.S.C. § 233 (*infra*, pp. 25-27).

Similarly, in 1953, Congress provided that in California, Minnesota, Nebraska, Oregon, and Wisconsin—with the exception of one named reservation in each of three states, later amended to reduce the exception to two—the states named "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere in the State." 28 U.S.C. § 1360, added by § 4 of the Act of August 15, 1953, c. 505, 67 Stat.

588, 589, and as subsequently amended by § 2 of the Act of August 24, 1954, c. 910, 68 Stat. 795 (*infra*, pp. 27-28).

Despite this trend, however, Congress has never enacted any similar measure in respect of the Navajo Tribe; to the contrary. For when, in 1949, Congress passed an Act making Navajos (*inter alia*) subject to the laws of the states in which their lands were located, so that "in all cases the jurisdiction of the State, the Federal, and the tribal courts shall be concurrent," the President vetoed the bill, although it provided substantial rehabilitation measures for the tribes affected. Sec. 9 of S. 1407, 81st Cong., 1st sess.; Sen. Doc. 119, 81st Cong., 1st sess., pp. 1-4, 6; 95 Cong. Rec. 13659-13660, 14784-14785 (*infra*, pp. 30-35). Thereafter—in the following year—Congress passed a similar act but without the jurisdictional features that had been found objectionable, and this became law. Act of April 19, 1950, c. 92, 64 Stat. 44, 25 U.S.C. §§ 631-640. It is more than passing strange that the court below recently adverted to the foregoing history of Congressional dealing with state jurisdiction over the Navajos when it held that the Arizona courts had no divorce jurisdiction over two Navajo Indians resident on the Navajo Reservation who, after marriage pursuant to an Arizona license, had obtained a divorce from the Navajo tribal court. *Begay* v. *Miller*, 70 Ariz. 380, 385, 222 P. 2d 624, 627-628.[3]

[3] In that case, two Navajo Indians resident on the Navajo Reservation, who had been married pursuant to an Arizona license, were divorced by the Navajo tribal court. The former wife, being dissatisfied with the tribal court's decree, instituted a new proceeding for divorce in the State court—the Superior Court of Apache County—and obtained a new decree of divorce with provisions for alimony. The former husband disregarded the

At the present time, Arizona may subject Navajo Indians to its laws if it desires to do so, notwithstanding the limitations in the Arizona Enabling Act (Sec. 20, Act of June 20, 1910, c. 310, 36 Stat. 557, 569) and those in its own Constitution, Art. 20, Fourth (*infra*, p. 25). For Congress in 1953 consented to the assumption of civil jurisdiction over Indians by any State that undertook to amend its constitution and laws accordingly. Secs. 6 and 7 of the Act of August 15, 1953, *supra*, 67 Stat. at 590 (*infra*, pp. 28-29). Arizona has taken no action pursuant to this consent, no doubt because it is not yet prepared to assume the police,

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alimony terms of the Superior Court's decree, was found in contempt, and, after being arrested by a state sheriff on the Navajo Reservation, was imprisoned in a state jail. On habeas corpus, he was released, the Supreme Court of Arizona saying (70 Ariz. at 388, 222 P. 2d at 629-630), "We hold that the Superior Court of Apache County was without jurisdiction to enter the decree of divorce attacked in this instant case; the decree of the tribal court being conclusive, hence the order holding petitioner in contempt of its decree was a nullity, which entitles the petitioner to his discharge on habeas corpus."

The decision recognized the competency of the tribal court to grant the divorce, and gave recognition to its decree. Thus, in effect, it gave full faith and credit to that decree. But the failure of the Superior Court of Apache County to give the tribal court's decree full faith and credit, no matter how erroneous such failure might be, would hardly render the Superior Court's decree a nullity. Therefore, since the Supreme Court of Arizona (70 Ariz. at 388, 222 P. 2d at 629-630) stated that the question was whether the Superior Court of Apache County had jurisdiction, since the Supreme Court of Arizona did not place its decision on full faith and credit, since that court discussed at length President Truman's veto of the Navajo-Hopi Act because of its jurisdictional features, and since the case arose on collateral attack on the Superior Court decree by way of habeas corpus, we feel justified in giving *Begay* v. *Miller* the effect attributed to it in the text, namely, that the case holds that Arizona courts have no divorce jurisdiction over Navajo Indians resident on the Navajo Reservation.

school, road construction, and other obligations which the exercise of civil jurisdiction over the Navajos would entail. But until the people of Arizona amend their Constitution pursuant to the Congressional consent of 1953, the courts of Arizona are not free—by way of a judicial short-cut such as was attempted in the opinion below—to exercise civil jurisdiction over any Indians who reside on Indian reservations.[4]

That is not to say that Arizona lacks territorial jurisdiction over the Navajo Reservation. That Reservation is within Arizona's boundaries. See *Harrison* v. *Laveen,* 67 Ariz. 337, 196 P. 2d 456, which recognized the Indians' right to vote in Arizona. Arizona may accordingly tax property owned by a non-Indian within that Reservation. *Thomas* v. *Gay,* 169 U.S. 264. An Arizona sheriff could effect valid service of process on a non-Indian within the Reservation where the lawsuit is one between non-Indians. See *United States* v. *Kagama,* 118 U.S. 375, 383, quoted *supra* at p. 10; *Langford* v. *Monteith,* 102 U.S. 145, 147; *Utah & Northern R. Co.* v. *Fisher,* 116 U.S. 28, 31.

The fear of the court below, that if petitioners' jurisdictional contentions were sustained, "a white man could murder another white man on or off an Indian reservation and would be secure from Arizona prosecution so long as he could remain within the boundaries of a reservation" (R. 56-57), is plainly without foundation, in view of the consistent line of cases to the contrary, from *United States* v. *McBrat-*

[4] There remains a serious question whether Navajo consent would also be necessary before the Act of August 15, 1953, can be given full effect, but since Arizona has taken no steps to avail itself of that Act's terms, it is not necessary to pursue that inquiry in this case.

ney, 104 U.S. 621, through *Draper* v. *United States,* 164 U.S. 240 (cited but mis-stated in the opinion below, R. 56),[5] down to *New York ex rel. Ray* v. *Martin,* 326 U.S. 496, all of which hold that a State may punish a non-Indian for an offense committed against another non-Indian within an Indian reservation.

The fear expressed by the court below is therefore unfounded—and yet the same court recognized, only three weeks after the ruling now under review, that the Arizona courts had no criminal jurisdiction over a Navajo Indian violating state law on a highway passing through the Navajo Reservation. *Application of Denetclaw,* 83 Ariz. 299, 320 P. 2d 697. The Supreme Court of New Mexico, a few days earlier, had decided the same point in an identical case arising on the portion of the Navajo Reservation that is within New Mexico. *State* v. *Begay,* 63 N.M. 409, 320 P. 2d 1017, certiorari denied, 357 U.S. 918. The reason is plain: Congress has not consented to the exercise of state jurisdiction over Navajo Indians residing on the Navajo Reservation. But non-Indians guilty of similar conduct as Denetclaw and Begay, and at precisely

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[5] "That case [*Draper*] is authority for the proposition that in a case over which the state would have jurisdiction except for the fact that it occurred within the boundaries of an Indian reservation, it would have such jurisdiction after admission of the state to the Union except to the extent that sole and exclusive power over the reservation in the federal government is expressly reserved." All that was decided in *Draper* was that Montana had jurisdiction over an offense committed by a non-Indian against another non-Indian within the Crow Reservation. The case is no authority for, and has nothing to do with, state jurisdiction over Indians either as to criminal or civil matters arising within an Indian reservation.

the same places on the same highways, could not hope to escape punishment by the respective States involved.

The sum of the foregoing cases is that a State has jurisdiction over the territory of an Indian reservation within its boundaries—except in matters concerning Indians. Otherwise stated, jurisdiction over matters not concerning Indians is the extent of Arizona's jurisdiction within the Navajo Reservation. *Utah & Northern R. Co.* v. *Fisher,* 116 U.S. 28; *United States* v. *Sutton,* 215 U.S. 291; *Surplus Trading Co.* v. *Cook,* 281 U.S. 647, 651. The decision below, which runs counter to that well settled rule, is therefore erroneous and must be reversed.

It only remains to consider the issue to which the court below devoted most of its reasoning (R. 55-59), namely, petitioners' contention that Arizona had no power to serve process on the Reservation in a case of this character.

Petitioners' position had support in the opinions of this Court. Thus, in *United States* v. *Kagama,* 118 U.S. 375, upholding federal jurisdiction in a case of murder of an Indian by Indians on an Indian reservation within the boundaries of a State, the Court pointed out that its decision (118 U.S. at 383) "does not interfere with the process of the state courts within the Reservation, nor with the operation of state laws upon white people found there." In *Langford* v. *Monteith,* 102 U.S. 145, upholding state jurisdiction over a civil action between white men for the possession of real property on an Indian reservation within a territory, the Court said (p. 147) that, in the absence of anything excluding the reservation from territorial jurisdiction, "the land held by them [the Indians] is

a part of the Territory and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction." Similarly, in *Utah & N. R. Co.* v. *Fisher,* 116 U.S. 28, in the course of sustaining the right of a territory to tax non-Indian property in an Indian reservation within its borders, the Court said (p. 31): "It has therefore been held that process of its courts may run into an Indian reservation of this kind, where the subject matter or controversy is otherwise within their cognizance."

Since, in the present case, as we have shown, jurisdiction over petitioners was plainly outside the cognizance of the state courts, petitioners below had substantial basis for contending that process in such action did not run within the reservation.

But we suggest that it is not necessary to decide the question of process. It is sufficient for disposition of the present case to hold that the Arizona courts had no jurisdiction, a holding that would render their process a nullity here and make it unnecessary to determine whether there was any physical right to serve such a scrap of paper within the reservation.

Such an approach would parallel that of the court below in *Begay* v. *Miller,* 70 Ariz. 380, 222 P. 2d 624, already discussed *supra,* pp. 13-14. There, after releasing the petitioner in consequence of its holding that the decree for contempt for which he had been confined was a nullity, the court below felt it unnecessary to consider the other question in the case, namely, whether the Arizona sheriff acted properly in serving such void process and arresting petitioner within the Navajo Reservation. We urge a similar disposition here.

II. The circumstance that the transaction in suit arose out of federally regulated trade with Indians is an additional reason why the subject matter was beyond the jurisdiction of the State court, but both proper protection of the Indians' interests and adherence to prior decisions require that this Court's decision be based on the broader ground of lack of jurisdiction over tribal Indians in reference to any cause of action arising on an Indian reservation.

There is another if narrower reason why the decision below is violative of hitherto established Federal immunities. Not only did the Arizona courts lack jurisdiction over tribal Indians residing on an Indian reservation with respect to any cause of action arising there, but the Arizona courts specifically lacked jurisdiction over the particular subject-matter of the present action, which arose out of a commercial transaction between Indians and a Federally licensed Indian trader.

On this phase of the case, the source of Federal power is the Commerce Clause (Art. I, Sec. 8, cl. 3; *infra,* p. 25), the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." That power of regulating commerce with the Indians is "exclusive and absolute"; it is "a power as broad and as free from restrictions as that to regulate commerce with foreign nations." *Dick* v. *United States,* 208 U.S. 340, 356; *United States* v. *43 Gallons of Whiskey,* 93 U.S. 188, 194. And "commerce with the Indian tribes, means commerce with the individuals composing those tribes." *United States* v. *Holliday,* 3 Wall. 407, 417.

Pursuant to its power to regulate commerce with the Indians, Congress has declared (25 U.S.C. § 262;

infra, p. 27) that permission to trade with the Indians is subject to "such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

Respondent availed himself of this permission to trade with petitioners within the Navajo Reservation (R. 43, ¶¶ 3, 5), and thereby subjected himself to the elaborate and rigorous regulations governing such commerce. See 25 C.F.R. §§ 252.1-252.28, *Traders on Navajo, Zuni, and Hopi Reservations.*[6] Among those regulations which the Commissioner promulgated "for the protection of said Indians" was one (25 C.F.R. § 252.17; *infra*, p. 29) entitled "Credit at trader's risk," which stated that "A trader may extend credit to Indians, but such credit will be at the trader's own risk."

In our Petition, we advanced the view (Pet. 2, Question 2; Pet. 11-12) that this regulation rendered the present sale on unsecured credit unenforceable.

Investigation of the earlier versions of that regulation convinces us that this contention is untenable. As originally promulgated, the regulation read (General Indian Regulations of June 29, 1927, ¶ 22):

> "Credit to Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges by Indians to obtain credit or loans."

---

[6] We cite from the regulations as currently renumbered effective January 1, 1958, when they became Part 252 of Title 25, C.F.R. In the prior proceedings herein, they are referred to under their earlier numbering, when they constituted Part 277 of the same title. The 1958 revision effected no change in language or substance under the present heading, but only a renumbering.

In November 1933, an association of Indian traders meeting at Gallup, N.M., asked for the deletion of the second clause of the first sentence; they did not question the position that the Bureau of Indian Affairs should not act as a collection agency, but they felt that its agent should use at least moral suasion to persuade Indians to meet their obligations. Accordingly, in due course the first sentence was changed to read as it does now, and the second sentence was deleted. At present the regulations affirmatively provide for taking pawns and pledges. 25 C.F.R. § 252.16.

But the subject-matter of the transaction was trade between Indians and an Indian trader licensed pursuant to Federal law. This is a subject-matter expressly and exclusively delegated to Congress by the Constitution itself, and accordingly it cannot be made the subject of litigation in state courts as long as 25 U.S.C. § 262 (*infra*, p. 27) remains in force.

It is true that the court below held illegal the levy and sale of petitioners' sheep, relying on another regulation promulgated pursuant to 25 U.S.C. § 262, namely, 25 C.F.R. § 252.13 (*infra*, p. 29), to the effect that

> "All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent."

The court below said (R. 61), "We interpret this regulation as placing livestock in a special category and prohibiting buying of such property from the Indian without special permits issued by the superintendent." But this narrow view fails adequately to protect petitioners or any other Indians who are

hailed into state courts in respect of sales made on the reservation by a licensed trader. Even in this case, the expenses of the sale of the sheep that yielded $272 (R. 32) came to $246.72 (R. 33). And while the judgment against petitioners and the rationale of the opinion below still stand, that judgment may be enforced by execution levied against other property belonging to petitioners which does not fall within the regulation concerning livestock.

It is therefore quite unnecessary to conjure up imaginary horribles to foresee the havoc that the decision below will wreak upon the hitherto settled Federal administration of Indian affairs, and upon the Indian way of life itself.

Indeed, the circumstances of the present case demonstrate that it will not be a sufficient protection of tribal Indians to rest reversal of the plainly erroneous judgment below on the narrower ground of lack-of-jurisdiction-of-subject-matter. What is needed is a reiteration of the broad proposition set forth in Point I of the present brief, that certainly in the absence of Congressional consent, state courts have no jurisdiction over tribal Indians residing on Indian reservations as to any transaction arising there.

That broader proposition has a sound foundation in the decisions of this Court for a century and a quarter. That broader proposition was recognized by the Executive when President Truman vetoed the Navajo-Hopi Rehabilitation Bill that proposed to give state courts concurrent jurisdiction over the Indians of those two tribes. That broader proposition was recognized by Congress when it repassed the Navajo-Hopi

Rehabilitation Bill minus its objectionable jurisdictional provision. And that broader proposition was recognized by the court below this year when it held that Arizona had no criminal jurisdiction over tribal Navajos on the Navajo Reservation. *Application of Denetclaw*, 83 Ariz. 299, 320 P. 2d 697, *supra*, p. 16.

This Court, therefore, should place its decision on the ground of lack of jurisdiction in the Arizona courts over tribal Indians with reference to causes of action arising on Indian reservations. That course is required, not only to effectuate Federal supervision of Indians, not only to protect thousands of tribal Indians from spoliation, but also to maintain unbroken the doctrinal consistency of this Court's decisions, which, since the days of Chief Justice Marshall, have upheld the right of Indians to be free from jurisdiction sought to be asserted over them by any State.

CONCLUSION

The decision below is palpably and inescapably erroneous. It disturbs Indian immunities that for more than a century had been well-settled, and threatens the economic survival of the many thousands of Indians who still live on reservations. The judgment below should therefore be reversed, on the ground that state courts do not have jurisdiction over tribal In-

dians residing on Indian reservations with respect to causes of action arising on such reservations.

Respectfully submitted.

NORMAN M. LITTELL,
1824-26 Jefferson Place, N.W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.

CHARLES J. ALEXANDER,
1824-26 Jefferson Place, N.W.,
Washington 6, D. C.,
Of Counsel.

AUGUST 1958.

APPENDIX A

Constitutional, Statutory, and Regulatory Provisions Involved.

1. The Constitution of the United States provides, Art. I, Sec. 8, Cl. 3:

> "The Congress shall have Power . . .
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

2. The Constitution of the State of Arizona provides, in pertinent part:

> "Article 20
> "Ordinance
>
> "The following ordinance shall be inviolable without the consent of the United States and the people of this State:
>
> . . . . . .
>
> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the congress of the United States."

3. Section 1 of the Act of Sept. 13, 1950, c. 947, 64 Stat. 845, 25 U.S.C. § 233 as amended, is as follows:

> **"§ 233. Jurisdiction of New York State Courts in Civil Actions**
>
> "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between

one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided,* That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further,* That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further,* That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further,* That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making

applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

4. Section 1 of the Act of March 3, 1901, c. 832, 31 Stat. 1066, as amended (25 U.S.C. § 262), is as follows:

"§ 262. Persons Permitted to Trade With Indians.

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

5. Section 1360 of 28 U.S.C., as added by Sec. 4 of the Act of Aug. 15, 1953, c. 505, 67 Stat. 588, 589, and subsequently amended by Sec. 2 of the Act of Aug. 24, 1954, c. 910, 68 Stat. 795, is as follows:

"§ 1360. State Civil Jurisdiction in Actions to Which Indians Are Parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the area of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State,
Oregon	All Indian country within the State except the Warm Springs Reservation
Wisconsin	All Indian country within the State

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

6. Sections 6 and 7 of the Act of Aug. 15, 1953, c. 505, 67 Stat. 588, 590, are as follows:

"Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of

civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

7. 25 CFR § 252.13 is as follows:

"252.13. *Trade confined to licensed premises.* All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent."

8. 25 CFR 252.17 is as follows:

"252.17. *Credit at trader's risk.* A trader may extend credit to Indians, but such credit will be at the trader's own risk. All payments to Indians for products or labor must be made in lawful United States money or in credit on the trader's books at the option of the Indian. Receipt must be given Indians for all articles they have sold to traders and on which they have requested book credit. These receipts must show the following information: (a) the date the transaction was made, (b) the amount paid the Indian, and (c) a description of the article or articles sold. All receipts issued by the trader for Indian products must be recorded in the traders' books in such a manner that all information contained in the receipt is duplicated. Receipts may be transferred upon order of the initial recipient if it is to his convenience that such a procedure be followed."

Appendix B

Veto of 1949 Navajo-Hopi Rehabilitation Bill Because of Jurisdictional Feature

1. Section 9 of S. 1407 (95 Cong. Rec. 13659-13660; Sen. Doc. 119, 81st Cong., 1st sess., p. 6) provided in pertinent part as follows:

> "Sec. 9. From and after the effective date of this Act, all Indians within the tribal or allocated lands of the Navajo and Hopi Reservations shall be subject to the laws of the State wherein such lands are located, and shall have access to the courts of such State for the enforcement of their rights and redress of wrongs to the same extent and in the same manner as any other citizen thereof; * * * *And provided further,* That nothing in this Act provided shall be deemed to impair the terms and obligations of any existing statute or treaty between the United States Government and the said Indians, nor take away the jurisdiction now exercised by the Federal Government or the tribes, but in all cases the jurisdiction of the State, the Federal, and the tribal courts shall be concurrent."

2. The text of the President's veto of the foregoing bill (Sen. Doc. 119, 81st Cong., 1st sess., pp. 1-4; 95 Cong. Rec. 14784-14785) was as follows:

> "October 17, 1949
>
> "To the Senate of the United States:
>
> "I return herewith, without my approval, the enrolled bill (S. 1407) to promote the rehabilitation of the Navajo and Hopi Tribes of Indians and the better utilization of the resources of the Navajo and Hopi Indian Reservations, and for other purposes.
>
> "The principal objective of this bill is the establishment of a 10-year program of capital and other improvements for the benefit and rehabilitation of the Navajo and Hopi Tribes of Indians. Appropriations would be authorized for this purpose total-

ing $88,570,000. Among the principal program goals specified and the amounts provided therefor would be: roads and trails, $20,000,000; school buildings and equipment, and other educational measure, $25,000,000; soil and water conservation and range improvement work, $10,000,000; and completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

"I have withheld my approval with reluctance and only after the most careful consideration of all the provisions of S. 1407. The bill contains many meritorious features. In fact, its only objectionable provisions are those of section 9 which, with some qualifications, extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under Federal and tribal laws and courts. Section 9 is heavily weighted with possibilities of grave injury to the very people who are intended to be the beneficiaries of the bill. Its many and serious defects outweigh, in my judgment, the merits of the rest of the bill.

"In the first place, the meaning of section 9 is obscure. While it seeks to subject the Navajo and Hopi Indians to the civil and criminal laws of the States where their reservations are situated, in certain circumstances and under certain conditions, the details of these circumstances and conditions cannot be determined, with any assurance of legal correctness, from the language of section 9. For example, the right to inherit personal property, such as cattle, sheep, tools and utensils, is a matter of vital concern to the Navajo and Hopi Indians, as it is to other human beings. The descent of this property upon death is a matter which is now governed by their tribal practices and customs. Section 9 might be construed as abrogating these practices and customs at one fell swoop and imposing upon these Indians a system governing the descent and distribution of personal property which they neither want nor understand.

Another matter of vital concern to the Navajo and Hopi Indians is their water rights, since they live in an arid country where water is the most precious of all natural resources. The jurisdiction to adjudicate, protect, and enforce these water rights is now vested in the Federal courts where Indian rights are assured of full protection. Section 9 might be construed as transferring plenary power over Indian water rights to the State courts where there is much less assurance of protection for Indian rights, or it might be construed as leaving the existing Federal jurisdiction substantially unimpaired. These two illustrations are far from exhaustive, but they reveal quite plainly that the bill contains serious threats to the basic rights of these Indians, and at best would create a series of legal tangles which only years of expensive litigation could unravel. In the interim, many valuable interests might be lost and much irreparable injury suffered by the Navajo and Hopi peoples.

"A second major objection to section 9 is that its avowed purpose of accomplishing a broad-scale extension of State laws to the Navajo and Hopi reservations is in conflict with one of the fundamental principles of Indian law accepted by our Nation, namely, the principle of respect for tribal self-determination in matters of local government. The Congress and the executive branch have repeatedly recognized that so long as Indian communities wished to maintain, and were prepared to maintain, their own political and social institutions, they should not be forced to do otherwise. One of the most liberal self-government clauses ever written for an Indian tribe appears in section 6 of the enrolled bill. That section declares that the Navajo people shall have 'the right to adopt a tribal constitution', which 'may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein',

and which 'shall authorize the fullest possible participation of the Navajos in the administration of their affairs'. It would be inconsistent to enact into law section 9 concurrently with section 6. If either is to be accepted as meaning what it says, the other must be viewed as mainly rhetoric.

"Statutes have, of course, been enacted from time to time extending State criminal or civil laws to particular Indian communities. Primarily, those statutes dealt with comparatively small groups, the members of which through long association with neighboring whites, had reached the state where they were prepared to and wished to be governed by State and local law. The Navajo and Hopi Tribes are not in this category. They are, indeed, the Indians who are probably least prepared for such a major change.

"Ultimate acceptance of State jurisdiction is a logical consequence of our policy of assisting the Indians to develop their natural talents and physical resources in ways that will enable them to participate fully in our free, but vigorously competitive, society. In the long run, this process of adjustment to our culture can be expected to result in the complete merger of all Indian groups into the general body of our population. Yet the desirability of this result is no reason for compelling the Navajos and Hopis to accept legal integration long before they have been prepared for such a consequence through the orderly course of social and economic integration. Premature steps for tribal dissolution have invariably revealed that the process of cultural adjustment cannot be hastened, and may be retarded, by attempts at legal compulsion. For many years more the lives of the Navajo and Hopi peoples will continue to be governed by the isolation of the country where they live, the facts that four-fifths of them cannot speak English and that the majority of their children have never been to school, the primitive background of their social concepts, the limitations of their economic resources, and other circumstances which tend to make their tribal govern-

ments a necessary instrument for their continued progress in civilization. It would be unjust and unwise to compel them to abide by State laws written to fill other needs than theirs.

"In reaching my decision to veto S. 1407, I have been greatly influenced by the attitude of the Navajo Indians toward the bill. The Navajo Tribe includes about 65,000 of the approximately 70,000 Indians affected by S. 1407. They greatly favor the long-range rehabilitation program which the bill proposes. But much as they favor the constructive provisions of the bill, they fear section 9 more. This is indicated by the fact that a meeting held on October 13, 1949, after final Congressional action on the bill, the Navajo Tribal Council, the Tribe's governing body, adopted a resolution urging that I veto S. 1407.

"In withholding approval from S. 1407, I am glad to note that the principal feature of that measure, the 10-year program of capital improvements provided for in section 1, can be put into effect through normal appropriation procedures. Expenditures for substantially all of the purposes listed in section 1 are authorized by existing laws relating to Indian affairs. The purpose in proposing a special authorization for the 10-year program was to afford the Congress an opportunity to review that program as a whole before appropriation estimates were submitted for the individual items. The Congress, by its action in S. 1407, has now manifested its view that the capital improvements in question should be undertaken at once and prosecuted speedily to completion. Accordingly, I plan to include in the budget for the fiscal year 1951, appropriation estimates that will provide for initiation of the 10-year program. Since statutory authorization for almost all of these items already exists, the failure of S. 1407 to become law will not interpose a legal bar to the appropriation of the necessary funds, although it will result in the loss of some incidental features of S. 1407 that would have been of value to the Indians. I would, of course,

be glad to approve a bill that incorporated these features and the other provisions of S. 1407, without the objectionable provisions of section 9, should the Congress see fit to pass such a measure.

"HARRY S. TRUMAN.

"THE WHITE HOUSE,
"October 17, 1949."